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In the Supreme Court
of the
United States

OCTOBER TERM, 1936.

No. 446.

AETNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT; A CORPORATION,
PETITIONER,

VS:

EDWIN P. HAWORTH AND CORA M. HAWORTH.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR REHEARING AND FOR MODIFICATION OF THE OPINION.

REES TURPIN,
Solicitor for the Respondents.

CASES CITED.

Newsum et al. v. Interstate Realty Co. et al., 152 Tenn. 302, 278 S. W. 56 6

Ladner et al. v. Siegel et al., 294 Pa. 368, 144 Atl. 274 6

Washington Detroit Theater Co. v. Moore, 249 Mich. 673; 229 N. W. 618 6

Ziegler v. Pickett, 46 Wyo. 283, 25 Pac. (2d) 391 6

Lariviere v. Larocque, 105 Vt. 460, 168 A. 559, 91 A. L. R. 1514..... 6, 7

Bank of Bellows Falls v. Rutland and Burlington R. R. Co., 28 Vt..... 7

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TO THE SUPREME COURT OF THE UNITED STATES, AND THE HONORABLE JUDGES THEREOF:

Come now Edwin P. Haworth and Cora M. Haworth, the respondents in the above entitled proceeding, and present this their petition for a rehearing and for modification of the opinion and decision of this court filed

herein concerning the validity, the application and the applicability of the Federal Declaratory Judgment Act of June 4, 1934. In support of this petition for a rehearing the respondents respectfully show that the court overlooked material matters of great public importance.

Respondents' counsel, signing this petition, further certifies that it is presented in good faith and not for delay.

This is the first case in which the Federal Declaratory Judgment Act has been brought before this court. Definition of the scope of the law is of widespread public importance. Many declaratory proceedings commenced by insurance companies and others are pending in the district courts and in the circuit courts of appeals. As the opinion filed in this case is written, implications and conclusions will be drawn from it which we believe this court does not intend. If this court does intend them, then we respectfully submit they should be stated positively instead of being left to implication.

We respectfully submit that the case presented by the record here is not sufficiently disposed of by a holding that the petition presents a controversy in the constitutional sense. The power of the trial court to exercise judicial discretion in entertaining or refusing to entertain the petition, or the case that may be presented by the evidence, on other grounds is of equal importance.

The district court dismissed plaintiff's bill or petition asking for a declaratory judgment concerning certain policies of insurance, one of the grounds being that it does not present a controversy in the constitutional sense between plaintiff and defendants. (R. 83). Judge Thomas in the majority opinion of the circuit court of appeals said: "The question for our determination is

whether the facts stated in the petition present an 'actual' or justiciable 'controversy' in the constitutional sense, between the plaintiff and defendants." (R. 95). The conclusion of that court is thus stated in that opinion (R. 99):

> "The petition, therefore, fails to state a cause of action under the Declaratory Judgment Act because it fails to state facts disclosing an 'actual controversy' in the constitutional sense. It fails in this because the facts averred do not show that any right of the plaintiff is presently being invaded or imminently and prejudicially affected by the alleged acts of the defendants. The judicial power of the federal courts does not extend to such vague and indefinite questions. Consequently the trial court did not err in dismissing the petition, and the order appealed from must be and it is Affirmed."

This court, in its opinion filed March 1, 1937, decided that the Declaratory Judgment Act must be deemed to fall within the ambit of congressional power, so far as it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends.

This court further held that plaintiff's petition presents a case or controversy that is not by its nature removed from the ambit of congressional power, but, to the contrary, is of a kind or character to which the judicial power extends. You said:

> "There is here a dispute between parties who face each other in an adversary proceeding. The dispute relates to legal rights and obligations arising from the contracts of insurance. The dispute is definite and concrete, not hypothetical or abstract. Prior to this suit, the parties had taken adverse positions with respect to their existing obligations.

> Their contentions concerned the disability benefits which were to be payable upon prescribed conditions. On the one side, the insured claimed that he had become totally and permanently disabled and hence was relieved of the obligation to continue the payment of premiums and was entitled to the stipulated disability benefits and to the continuance of the policies in force. The insured presented this claim formally, as required by the policies. It was a claim of a present, specific right. On the other side, the company made an equally definite claim that the alleged basic fact did not exist, that the insured was not totally and permanently disabled and had not been relieved of the duty to continue the payment of premiums, that in consequence the policies had lapsed, and that the company was thus freed from its obligation either to pay disability benefits or to continue the insurance in force. Such a dispute is manifestly susceptible of judicial determination. It calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts."

This court has before it the able opinions filed in the district court and the circuit court of appeals. The matter was argued at length in our original brief. We feel we can say no more than has been said upon the question of "justiciable controversy."

We will accept the decision of this court that a dispute is not withdrawn from judicial cognizance merely by the circumstance that it turns upon a question of fact.

Accepting and following, as it seems we must, the decision of this court thus far, we respectfully submit that the opinion filed in this case in this court creates uncertainty in a matter of great and wide public importance.

We respectfully submit that the briefs of these respondents, both here and in the circuit court of ap-

peals, and the record filed here, fairly call for and make appropriate a definite answer to the following questions.

Is the Declaratory Judgment Act of June 14, 1934, inflexible direction to the district courts to try in that manner every actual controversy presented by a petition for a declaratory judgment? Or may a district court take into its consideration the circumstances of the particular case before it, or the situation or conduct of the parties, and exercise its discretion as to whether under the law it should declare a judgment at all in any particular case?

In exercising such discretion as it may have, of course, the court must be governed by fixed principles which may be adopted upon the subject, and not upon the mere caprice of the judge before whom the cause happens to be tried.

If discretion be denied the district courts, then when any person asserts against any other, out of court, a demand that would be of a justiciable nature if asserted in court, whether growing out of contract, property rights or tort, then the law would be that every controversy must be determined by a declaratory proceeding if either party demands it before ordinary suit is brought by the potential plaintiff.

The language of the Declaratory Judgment Act is that "the courts of the United States shall have power upon petition", etc., "to declare rights and other legal relations of any interested party petitioning for such declaration."

It is respectfully submitted that to construe the words "shall have power" as an inflexible direction to try in that manner every controversy presented by such a petition would work a change in our jurisprudence

that was never intended by the congress. The consequences of such a change in judicial procedure seem to us beyond present comprehension.

When this law was enacted and its language was used, the state courts in the application of state declaratory judgment laws had recognized the court's discretion in such matters.

In *Newsum et al* v. *Interstate Realty Co. et al.*, 152 Tenn. 302, 278 S. W. 56, the Supreme Court of Tennessee, holding that the case before it was not a proper one for a declaratory judgment, said:

> "Recognizing that the courts have a very wide discretion under these acts, which should be exercised with the utmost caution, it has been said by good authority that 'a declaration may properly be refused if it can be made only after a judicial investigation of disputed facts.' Freeman on Judgments, Vol. 3 (5th Ed.), Par. 1356."

In *Ladner et al* v. *Siegel et al.*, 294 Pa. 368, 144 Atl. 274, based upon the Declaratory Judgment Act of Pennsylvania, which contained the same authority as here, "shall have power," the discretion of the court in such matters was recognized.

Washington Detroit Theater Co. v. *Moore*, 249 Mich. 673; 229 N. W. 618.

Ziegler v. *Pickett*, 46 Wyo., 283, 25 Pac. (2d) 391.

In *Lariviere* v. *Larocque*, 105 Vt. 460, 168 A. 559, 91 A. L. R. 1514, the Supreme Court of Vermont, in an action for the cancellation of a conveyance, speaks clearly and concisely of judicial discretion. We believe what is there said is applicable to proceedings under this statute. The court said:

"The application to a court of equity for the cancellation or rescission of agreements, conveyances and other instruments is not founded on an absolute right, as in most actions at law, but is rather an appeal to the sound discretion of the court. The discretion to be exercised is not an arbitrary or capricious discretion, but is a sound and reasonable one to be exercised according to what is reasonable and proper under the circumstances of the particular case."

The Vermont court there reaffirms, from its decision in *Bank of Bellows Falls* v. *Rutland and Burlington R. R. Co.*, 28 Vt., the following:

"The discretion of the chancellor, however, is not to be an arbitrary or a capricious, but a reasonable one, which will commend itself to the conscience of the chancellor, under all the circumstances of the particular case. The jurisdiction, in such a case, proceeds upon the ground of administering protective, or preventive justice, and the cases go upon the principle *quia timet*, as it is technically called."

Appeals are expensive matters in both money and time. The expense is sometimes greater than a particular litigant can bear. We respectfully submit that the questions presented in this motion are fairly presented by the record; that they must inevitably arise in this and the host of other declaratory judgment proceedings now pending; and that a definite answer to such questions by the decision and opinion of this court in this case will be helpful to courts and litigants in large numbers.

WHEREFORE, the respondents herein respectfully urge that this petition for rehearing and for modification of the decision and opinion be granted, and that

the questions presented by this motion be definitely disposed of by the opinion of this court.

Respectfully submitted,

REES TURPIN,
Solicitor for the Respondents.

Certificate of Counsel.

I, Rees Turpin, counsel signing the foregoing petition for rehearing and modification of the opinion, hereby certify that such motion is presented in good faith and not for delay.

REES TURPIN.